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FILED
DEC 25 PM 3:27
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U.S. DISTRICT COURT
SAN FRANCISCO, CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

e-filing

ADR

LILLIAN MUNSON, an individual,

Plaintiff,

v.

AT&T, a Delaware corporation, PACIFIC
BELL TELEPHONE COMPANY, and DOES
1-50,

Defendants.

Case No.

07-06470

BZ

NOTICE OF REMOVAL OF ACTION TO
FEDERAL COURT

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Defendant AT&T CORP., a New York
Corporation (erroneously sued as "AT&T, a Delaware corporation") hereby removes to this
Court the state court action described below.

1. On October 18, 2007, an action was commenced in the Superior Court
of the State of California in and for the County of Alameda, entitled *LILLIAN MUNSON, an
individual, Plaintiff, v. AT&T, a Delaware corporation, and DOES 1-50, Defendants*, as case

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MILLER LAW GROUP
A PROFESSIONAL CORPORATION
LAKESIDE, CALIFORNIA

NOTICE OF ASSIGNMENT
TO MAGISTRATE JUDGE SENT

number RG 07-352153 ("Complaint").¹ The Complaint alleged the following seven causes of action: 1. "Discrimination Based on Race in Violation of California Government Code § 12940"; 2. "Discrimination Based on Physical Disability in Violation of California Government Code § 12940"; 3. "Discrimination Based on Retaliation"; 4. "Intentional Infliction of Emotional Distress"; 5. "Breach of Contract"; 6. "Breach of Implied Covenant of Good Faith and Fair Dealing"; and 7. "Wrongful Termination in Violation of Public Policy." A copy of the Complaint is attached to the Declaration of Janine S. Simerly ("Simerly Dec.") as Exhibit A.²

2. On November 21, 2007, Defendant filed an amended version of the Complaint ("FAC"), which named PACIFIC BELL TELEPHONE COMPANY ("PACIFIC BELL") as a co-defendant in all causes of action.³ A copy of this FAC is attached to the Declaration of Janine S. Simerly as Exhibit C.

3. The first date upon which Defendant AT&T CORP. received a copy of this Complaint was November 26, 2007, when Defendant was served with a copy of the FAC and a summons from the state court. (Simerly Dec. ¶ 7) A copy of the summons is attached to the Declaration of Janine S. Simerly as Exhibit D.

4. To the best of Defendant's knowledge, Plaintiff has not yet attempted nor effected service on PACIFIC BELL. (Simerly Dec. ¶ 9) In any event, to date PACIFIC BELL has not been served. (*Id.*)

5. On December 21, 2007, Defendant AT&T CORP. filed a Motion to

¹ Plaintiff designated this Complaint as her "First Amended Complaint."

² Also on October 18, 2007, Plaintiff commenced an additional action in the same state court styled identically to the Complaint. This duplicative action was numbered RG 07-352092, and it alleged identical causes of action against "AT&T" to those alleged in the Complaint. Subsequently, on December 10, 2007, the state court dismissed that action without prejudice.

³ AT&T Corp. is a separate business entity from Pacific Bell Telephone Company. AT&T Corp., formerly known as American Telephone and Telegraph was incorporated on March 3, 1885 in New York. It is not, and never has been, the parent entity of Pacific Bell Telephone Company.

1 Transfer Venue to Contra Costa County Superior Court and for Monetary Sanctions. A copy
 2 of that motion and all supporting documents are attached to the Declaration of Janine S.
 3 Simerly as Exhibit E.

FEDERAL QUESTION JURISDICTION

6. This Court has original jurisdiction over this civil action under 28 U.S.C.
 § 1331. It may be removed pursuant to 28 U.S.C. § 1441(b) because Section 301(a) of
 Labor Management Relations Act ("LMRA") completely preempts Plaintiff's state law claims
 for breach of contract and breach of the implied covenant of good faith and fair dealing.

7. Under Section 301(a), "[s]uits for violation of contracts between an
 employer and a labor organization representing employees in an industry affecting
 commerce . . . may be brought in any district court of the United States having jurisdiction of
 the parties." 29 U.S.C. § 185(a). Case law has consistently found that section 301 of the
 LMRA preempts state-law claims either: (1) where those claims are "founded directly on
 rights created by collective-bargaining agreements" or (2) where adjudication of claim based
 on a right created by state law requires interpretation of a collective bargaining agreement.
Hayden v. Reickerd, 957 F.2 1506, 1509 (9th Cir. 1991) (internal citations omitted). In such
 cases, the LMRA completely preempts all state law claims pursuant to *Allis-Chalmers Corp.*
v. Lueck, 471 U.S. 202, 200 (1985): "[W]hen resolution of a state-law claim is substantially
 dependent upon analysis of the terms of an agreement made between the parties in a labor
 contract, that claim must be either treated as a § 301 claim . . . or dismissed as pre-empted
 by federal labor-contract law."

8. Where Section 301 of the LMRA preempts a state law claim, that claim
 is "considered, from its inception, a federal claim." *Caterpillar, Inc. v. Williams*, 482 U.S.
 386, 393 (1987). Any such preempted state law claim is treated as though it arises under

1 federal law of which this Court has original jurisdiction under 28 U.S.C. § 1331, rendering
2 removal of that claim proper under 28 U.S.C. § 1441(b).

3
4 9. Normally, under the well-pleaded complaint rule, "federal [question]
5 jurisdiction exists only when a federal question is presented on the face of the plaintiff's
6 properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. at 392 (citing *Gully v.*
7 *First National Bank*, 299 U.S. 109, 112-113 (1936)). Therefore, ordinarily a plaintiff "may
8 avoid federal jurisdiction by exclusive reliance on state law." *Id.* At the same time, an
9 important limit to the well-pleaded complaint rule is the artful pleading doctrine, under which
10 a plaintiff "may not avoid federal jurisdiction by omitting from the complaint allegations of
11 federal law that are essential to establishment of his claim." *Paige v. Henry J. Kaiser Co.*,
12 826 F.2d 857, 860 (9th Cir. 1987); see also *Olguin v. Inspiration Consolidated Copper Co.*,
13 740 F.2d 1468, 1472 (9th Cir. 1984) ("A plaintiff may not . . . avoid federal jurisdiction simply
14 by omitting from the complaint federal law essential to his claim, or by casting in state law
15 terms a claim that can be only made under federal law.") (overruled on other grounds in
16 *Allis-Chalmers*, 471 U.S. at 220). Where a complaint is artfully pleaded, courts will re-
17 characterize it as a well-pleaded complaint and look beyond the facts alleged in the
18 complaint to determine where jurisdiction is proper. See *Paige*, 826 F.2d at 860-61.

19
20 10. Courts have applied the artful pleading doctrine to find claims
21 preempted by section 301 of the LMRA even where, on its face, a complaint does not
22 mention or implicate a collective bargaining agreement. See e.g., *Young v. Anthony's Fish*
23 *Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987) (contract claim preempted by section 301 even
24 though complaint did not reveal that plaintiff's employment was governed by a collective
25 bargaining agreement).

26
27 11. In this case, Plaintiff's claims for (1) breach of contract and (2) breach
28 of implied covenant of good faith and fair dealing are artfully pleaded claims that necessarily

1 require interpretation of the collective bargaining agreement between PACIFIC BELL and
2 Communications Workers of America ("CWA"), the labor union of which Plaintiff was a
3 member at all times relevant to this action. Based on the following facts, these claims are
4 completely preempted by section 301 of the LMRA and are properly removed on the
5 grounds of federal question jurisdiction:

6
7 (a) At all times relevant to this action, PACIFIC BELL was and is an
8 employer in an industry affecting commerce, as defined by the LMRA, 29 U.S.C. § 141, *et*
9 *seq.* (Declaration of Barbara J. Noonan ("Noonan Dec.") ¶ 3)

10
11 (b) At all times relevant to this action, Plaintiff was an employee of
12 PACIFIC BELL represented by CWA and employed pursuant to a collective bargaining
13 agreement ("CBA") between PACIFIC BELL and CWA. (Noonan Dec. ¶ 4-6) CWA is a
14 labor organization representing employees in an industry affecting commerce as defined in
15 the LMRA. (Noonan Dec. ¶ 5)

16
17 (c) At all times relevant to this action, a CBA governed the
18 employment relationship between Plaintiff and PACIFIC BELL, and the terms and conditions
19 of Plaintiff's employment. (Noonan Dec. ¶ 7)

20
21 (d) Plaintiff's causes of action for breach of contract and breach of
22 implied covenant of good faith and fair dealing reference "the contract" between Plaintiff and
23 Defendants. (FAC ¶ 50) Though Plaintiff fails to specify the contract on which she bases
24 these claims, the only contract in effect between PACIFIC BELL and Plaintiff at any time

1 relevant to this litigation was the CBA. (Noonan Dec. ¶ 8)⁴ Plaintiff's failure to specify the
 2 CBA as the contract on which she bases these claims cannot change the fact that any
 3 adjudication of these claims necessarily involves interpreting the terms of the CBA.

4
 5 (e) Furthermore, Plaintiff alleges employer misconduct involving her
 6 suspension and termination for violating a company policy. (FAC ¶22) PACIFIC BELL'S
 7 contractual obligations surrounding the suspension and termination of Plaintiff as a
 8 unionized employee were governed by the CBA. (Noonan Dec. ¶ 9) Only by interpreting
 9 PACIFIC BELL'S obligations under the CBA can a court determine whether PACIFIC BELL
 10 breached that contract and/or any implied covenant of good faith and fair dealing in
 11 suspending and terminating Plaintiff.

12
 13 11. Based on the above facts, Plaintiff's contract-related claims are
 14 preempted by Section 301 of the LMRA because the subject matter of those claims are
 15 covered by the CBA. Similarly, in *Young*, a unionized worker's claim alleging a breach of an
 16 oral employment contract was preempted "[b]ecause 'any independent agreement of
 17 employment . . . could be effective only as part of the collective bargaining agreement.'" *Young*, 830 F.2d at 997 (citations omitted). In that case, the subject matter of the alleged
 18 oral contract was "a job position covered by the CBA." *Id.* See also *Firestone v. S. Cal.*
 19 *Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000) (upholding district court finding of LMRA
 20 preemption of a dispute over whether employees were exempt from state overtime laws
 21 because it necessarily required interpreting premium pay provisions of collective bargaining
 22 agreement). Where, as here, a plaintiff files suit alleging breach of contract based on
 23 having been terminated pursuant to the terms of a CBA, that contract claim is preempted
 24

25
 26 ⁴ Defendant AT&T CORP. has never employed Plaintiff. See n.3, above. Having never assented
 27 even to employ Plaintiff, no contract has ever existed between AT&T CORP. and Plaintiff. Because
 28 Plaintiff's claims against AT&T CORP. are, nonetheless, based on her employment with PACIFIC
 BELL, Plaintiff's contract allegations against AT&T CORP. require interpretation of the CBA between
 CWA and PACIFIC BELL. Furthermore, once PACIFIC BELL is served, the terms of the CBA will be
 squarely before the Court.

1 and removal is appropriate.

2 3 SUPPLEMENTAL JURISDICTION 4

5 13. Under 29 U.S.C. § 1367(a), the exercise of supplemental jurisdiction
6 over state law claims is proper where those claims "form part of the same case or
7 controversy under Article III of the United States Constitution" as federal question claims
8 over which this Court has original jurisdiction. Pursuant to *United Mine Workers v. Gibbs*,
9 383 U.S. 715 (1966), the test for whether claims arise out of the same case or
10 controversy is whether they share "a common nucleus of operative facts," such that a
11 plaintiff "would ordinarily be expected to try them all in a single jurisdictional proceeding." *Id.*
12 at 725. In this case, Plaintiff's other claims for discrimination, retaliation and wrongful
13 discharge in violation of public policy are closely related to and inseparable from Plaintiff's
14 preempted claims of breach of contract and breach of implied covenant of good faith and
15 fair dealing because all arise out of the same allegations of misconduct by PACIFIC BELL.
16 (See FAC) For that reason, Plaintiff seeks to try them all in a single action, and this Court
17 should exercise supplemental jurisdiction to do so. See *Nishimoto v. Federman-Bachrach*
18 & Assoc., 903 F.2d 709, 714 (9th Cir. 1990) (exercise of pendent jurisdiction over state law
19 claims appropriate where those claims arose out of a common nucleus of operative fact with
20 ERISA claim). This Court should also exercise supplemental jurisdiction over Plaintiff's non-
21 preempted claims in the interest of fairness, convenience and judicial economy. See e.g.,
22 *Young*, 830 F.2d at 996, 999 (considerations of judicial economy made exercise of pendent
23 jurisdiction over plaintiff's state tort claims proper where contract and covenant claims were
24 preempted by Section 301).

25 26 NON-JOINDER OF CO-DEFENDANT PACIFIC BELL 27

28 14. As stated above, Plaintiff has not yet served Defendant PACIFIC BELL.

(Simerly Dec. ¶ 9) For this reason, PACIFIC BELL cannot formally join in this removal notice. Although PACIFIC BELL has not been served, PACIFIC BELL joins in Defendant AT&T CORP.'S desire to remove this action to federal court. (Noonan Dec. ¶ 2) Because parties named as defendants but not yet served in a state court action need not join in the notice of removal, removal is still proper in this instance, even without PACIFIC BELL'S formal joinder. *Salveson v. Western States Bankcard Assn.*, 731 F.2d 1423, 1429 (9th Cir. 1984) ("a party not served need not be joined" in removal notice); cf. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999) (failure to state that all non-joining defendants had not been properly served rendered removal notice deficient).

WHEREFORE, Defendant AT&T CORP. hereby removes the above-entitled action now pending before the Superior Court of the State of California, County of Alameda to this Court.

Dated: December 26, 2007

MILLER LAW GROUP
A Professional Corporation

By: Janine S. Simerly
Janine S. Simerly
Attorneys for Defendant AT&T CORP.